United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18,787

104

AUGUSTUS BOWSER

APPELLANT

vs.

THE UNITED STATES OF AMERICA

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

A. SLATER CLARKE
(Appointed by this Court)
210 Shoreham Building
Washington 5, D.C.

Attorney for Appellant

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in failing to grant a new trial to the Appellant herein after a former co-defendant, against whom the Government had dismissed the indictment, came forth and filed an affidavit as to the innocence of the Appellant in the crime, for which he was convicted.

2. Where there has been evidence produced at a motion for a new trial raising a substantial question concerning the defendant's participation in the crime, did the trial court abuse its discretion when it was clearly shown that the said evidence was, "newly discovered", unavailable and unknown to the defendant at the time of trial and such evidence could likely produce an acquittal and the failure to produce this evidence at trial was not due to a lack of diligence on the part of the Appellant.

I N D E X

TABLE OF CASES

STATUTES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18,787

AUGUSTUS BOWSER

APPELLANT

vs.

THE UNITED STATES OF AMERICA

APPELLEE

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The Appellant herein files this appeal from a final decision of the United States District Court in and for the District of Columbia wherein the said District Court denied the Appellant's motion for a judgment of acquittal and/or a new trial. This Court has jurisdiction of all appeals from final decisions of the United States District Court in and for the District of Columbia pursuant to Title 28, Section 1291 of the United States Code.

STATEMENT OF THE CASE

Your Appellant was originally indicted with co-defendants, John Sadler and Ronnie Rose on charges of housebreaking and larceny, which case is known in the United States District Court as Criminal No. 243-63. The trial of this case started on April 30, 1962 and was concluded sometime in early May of 1962. Your Appellant was found guilty on count one of housebreaking and guilty as to petty larceny on count two. He was thereafter sentenced to an imprisonment term and an appeal was filed in this Court (See Bowser v. U.S., Appeal No. 17,445 - U.S. App. D.C. 218 F 2d 273 (1963)). This Court affirmed the appeal on other grounds not pertinent to the present pending petition before the Court. After the U.S. Court of Appeals for the District of Columbia affirmed the appeal in April of 1963, a certified copy of the decision was filed in the United States District Court on June 18, 1963.

On April 26, 1962 without notice to this Appellant, or his counsel, an order was entered committing the co-defendant, John Sadler, to St. Elizabeths Hospital for a mental examination. The Appellant did not become aware of this fact until the trial on April 30, 1962. Subsequently on July 25, 1962 the defendant, John Sadler, was found competent to stand trial (see docket entry). On October 11, 1962 on the Government's motion the case against John Sadler was dismissed (see docket entries). On June 26, 1963 the former co-defendant, John Sadler, filed an affidavit of innocence which stated in substance as follows:

> "I, John Sadler, do hereby solemnly swear by my own volition with no favors or promises from anyone, nor have I been threatened or coerced or duressed, nor put under any pressure whatsoever.
>
> What I am doing, I am it with my own free will without the advice of anyone.

> I, John Sadler, did commit this crime on the 14th day of February, 1963, and Augustus Bowser taken or had no part in this crime at all.
>
> I have made this statement because I don't want to see an innocent person punished without just cause.
>
> Respectfully Submitted,
>
> John Sadler"

This document was dated the 24th day of June, 1963 and sworn to before a notary public (See TR Pages 14 and 15).

It was not until October 8, 1963 that counsel was appointed to represent your petitioner herein in respect to the affidavit filed by the former defendant, John Sadler, on June 26, 1963. On October 17, 1963 a further affidavit was filed by Bernard T. Rideout. The substance of this affidavit stated:

> "I, Bernard T. Rideout, do solemnly swear that one Augustus Bowser was not involved in the housebreaking case that took place on the 14th day of February, 1962."

It must be noted that this witness at the hearing on the motion for a new trial and judgment of acquittal testified that he could read and write and that he himself typed up this affidavit (TR Page 50).

On November 21, 1963 a motion was filed on behalf of your petitioner for a judgment of acquittal, or in the alternative, a motion for a new trial. The hearing on the motion for a judgment of acquittal or in the alternative for a new trial came on to be heard by the Court on the 20th day of December, 1963, at which time the Court denied the petitioner's motion. From the denial of this motion your petitioner has filed this appeal.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

RULE 33

NEW TRIAL

"The Court may grant a new trial to a defendant if required in the interest of justice. If trial was by the Court without a jury the court may vacate the judgment, if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within five (5) days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

STATEMENT OF POINTS

1. That the affidavit and testimony of the former co-defendant, Sadler, was of vital importance and could have produced a judgment of acquittal and, therefore, the Court erred in not granting the motion for judgment of acquittal.

2. That the affidavit and evidence of the former co-defendant, Sadler, was unavailable to this Appellant at the time of the trial and the Court erred in concluding otherwise.

3. That the additional testimony and evidence of innocence filed by Rideout, coupled with the affidavit and testimony of Sadler, was overwhelming evidence of the possible innocence of this Appellant and the trial Court abused its discretion in not granting a new trial.

SUMMARY OF ARGUMENT

The Appellant contends that he is entitled, at the minimum, to a new trial considering the fact that a former co-defendant who could not have been compelled to testify at the trial, after the trial and conviction of

your Appellant came forward and filed an affidavit and testified at the motion for a new trial concerning the innocence of the Appellant. In further support of the Appellant's position another party, Rideout, also came forward and filed an affidavit of the Appellant's innocence and testified to the same effect. The Appellant contends that the trial court abused its discretion in not granting a motion for a new trial considering the foregoing newly discovered evidence, which was material and and which could have possibly produced a judgment of acquittal if the said testimony had been produced at the trial. Any delay in obtaining the affidavits and testimony of these people is not attributable to this Appellant and notwithstanding Rule 33 of the Federal Rules of Criminal Procedure allows such motions to be filed up to and including two years.

ARGUMENT

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT A NEW TRIAL TO THE APPELLANT HEREIN AFTER A FORMER CO-DEFENDANT, AGAINST WHOM THE GOVERNMENT HAD DISMISSED THE INDICTMENT, CAME FORTH AND FILED AN AFFIDAVIT AS TO THE INNOCENCE OF THE APPELLANT IN THE CRIME, FOR WHICH HE WAS CONVICTED.

In respect to Point One, the Appellant requests the Court to read the affidavit of John Sadler filed in this cause, as well as, the reporter's transcript (TR 9-46).

Counsel does not urge on this Court that the trial court should have granted a judgment of acquittal, however, counsel believes that the Court did abuse its discretion in not granting a new trial considering the evidence that was presented at the time of the hearing on the motion of the Appellant herein on December 20, 1963.

In order for your Appellant herein to be entitled to a new trial based on newly discovered evidence, the law requires the Appellant to prove that the evidence in fact, was, "newly discovered" and unknown to the Appellant at the

time of trial. Furthermore, the Appellant must prove that the newly discovered evidence is material, is likely to produce an acquittal, and that there was no lack of diligence on his part for failure to learn of the evidence. (Federal Practice and Procedure, Volume 4, Section 2282).

Your Appellant submits that in this case the testimony which the Appellant produced at the motion for the new trial was unavailable at the time of trial through no fault of the Appellant and that the testimony supplied, "evidence of vital importance" and that, therefore, your Appellant is entitled to a new trial in accordance with the cases of Amos v. United States, 95 U.S. App. D.C. 31, 218 F 2d, 44; See also Arbuckle v. United States, 79 U.S. App. D.C. 282.

The principal evidence presented to the trial court at the hearing on the motion for a new trial was, in fact, newly discovered evidence. The evidence consisted of the statements contained in the affidavit of innocence as filed by John Sadler and his testimony which corroberated the facts contained in his affidavit. There are several reasons why this Court should consider the testimony and affidavit of the defendant, Sadler, as being in fact, newly discovered and without lack of diligence on the part of your Appellant herein. The Court record in this cause shows that the affiant and witness, John Sadler, had been committed to St. Elizabeths Hospital for a mental examination four days prior to the start of the trial of your Appellant pursuant to the Order of the trial court. This was done without knowledge on the part of your Appellant. John Sadler was unavailable as a result of his commitment. Even if called as a witness for the defendant, the credibility of Sadler's testimony would have been seriously affected and would have prejudiced the Appellant's defense because of his commitment and confinement to St. Elizabeths Hospital. Furthermore, at the time of the trial, Sadler was

under indictment jointly with the Appellant herein for the alleged crime. At the trial of this Appellant, Sadler could not have been forced to testify and could have invoked his privilege against self-incrimination pursuant to the Fifth Amendment of the Constitution of the United States. It is hardly likely under these facts that Sadler would have testified at the trial since his testimony could have been used against him in the pending case. As the record shows the Government dismissed the case against John Sadler sometime after the trial of your Appellant and at the hearing on the motion for a new trial by the Appellant, the Government, in attempting to get Sadler to change his testimony concerning the innocence of your Appellant, did imply to Sadler that he could be recharged for this crime on housebreaking (T-28). Notwithstanding, the witness, Sadler, held to the statements contained in the affidavit of innocence in regard to the Appellant, and stated as follows:

"Q-But you are satisfied that Bowser did not do it?

A-Well, he couldn't do it when he wasn't — he wasn't with the people that brought it to the apartment. (T-18)"

"Q-But you are positive that you stayed in Bowser's apartment until 12:00 o'clock that morning and he wasn't there, and these stolen articles were already there?

A-Yes, sir." (T-25).

Furthermore, not only did the witness, Sadler, state that the Appellant was not involved in this alleged crime, but also he identified others who brought the stolen goods into the apartment of Bowser (T-45).

The newly discovered evidence brought to the attention of the Court at the time of the hearing of the motion for a new trial was, in fact, material and not cumulative and merely impeaching. This evidence produced by the Appellant was of vital importance as required in the cases of Amos v. United States, supra. The affidavit and testimony of John Sadler alone is likely

to produce a judgment of acquittal at the trial of this cause. This testimony alone I submit is sufficient to have supported the granting of the motion for a new trial by the Court in this cause and for practical purposes constitutes an abuse of discretion in failing to grant such a motion.

> WHERE THERE HAS BEEN EVIDENCE PRODUCED AT A MOTION FOR A NEW TRIAL RAISING A SUBSTANTIAL QUESTION CONCERNING THE DEFENDANT'S PARTICIPATION IN THE CRIME, DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT WAS CLEARLY SHOWN THAT THE -- SAID EVIDENCE WAS, "NEWLY DISCOVERED", UNAVAILABLE AND UNKNOWN TO THE DEFENDANT AT THE TIME OF TRIAL AND SUCH EVIDENCE COULD LIKELY PRODUCE AN ACQUITTAL AND THE FAILURE TO PRODUCE THIS EVIDENCE AT TRIAL WAS NOT DUE TO A LACK OF DILIGENCE ON THE PART OF THE APPELLANT.

In reference to Points Two and Three the Appellant requests the Court to read the transcript (TR 48-54).

In addition to the affidavit and testimony of John Sadler, the Appellant also produced an affidavit of Bernard T. Rideout duly sworn and filed in this cause on October 17, 1963, as well as, the testimony of Bernard T. Rideout, the substance of which clearly showed that the Appellant, Bowser, was a long way from the scene of the crime (See T-51) at or about the time the crime was commited. The testimony and affidavit of Rideout placed the Appellant in different sections of the city and, therefore, this affidavit and testimony supplemented, supported and corroborated the affidavit and testimony of John Sadler. Your Appellant submits that the two witnesses and their affidavits filed herein clearly present a question of fact as to the guilt or innocence of the Appellant and that he is entitled to a new trial as a result of the newly discovered evidence which has been brought to the attention of the Court.

The failure to learn of this newly discovered evidence certainly was not due to a lack of diligence on the part of this Appellant. As I have argued

before, the main or principal witness, Sadler, was unavailable because of his commitment to St. Elizabeths Hospital. This case was not officially remanded to the United States District Court until on or about June 18, 1963, at which time a certified copy of this Court's opinion was filed in the trial court. The first affidavit of innocence was filed on behalf of your Appellant on June 26, 1963. Even if evidence had come to the attention of your Appellant prior to the remand of the case from the Court of Appeals, it is questionable as to whether the trial court could have entertained a motion for a new trial since the trial court lacked jurisdiction over this case pending the remand by the United States Court of Appeals. If there is any lack of diligence, I suggest that it was on behalf of the Government or on the failure to appoint an atorney to represent the interests of this indigent defendant. The Court had before it the affidavit of June 26, 1963 and yet there was no counsel appointed to represent the interests of this Appellant until October 8, 1963. This was something over which your Appellant submits he had no control. Appellant believes that the filing of the affidavit of innocence, which was done promptly after the remand of the case for the United States District Court complied with the spirit, if not the exact language of Rule 33 of the Federal Rules of Criminal Procedure. This Court should consider the purpose and intent of Rule 33 of the Federal Rules of Criminal Procedure, which allows for the filing of the motion for a new trial on newly discovered evidence to be made up to and including two years after final judgment. Your Appellant has complied with this rule. Rule 33 of the Federal Rules of Criminal Procedure provides that a court may grant a defendant a new trial in the, "interests of justice". Therefore, if the trial court had such a right, it certainly also had the right upon the filing of the affidavit of innocence to conduct a hearing in respect

to the Appellant's innocence. Your Appellant, therefore, submits that there was no lack of diligence on his part. He has at all times been incarcerated and it has been most difficult for him to gather evidence and to locate the parties who gave evidence in respect to his innocence.

Counsel was well aware of the fact that generally an Appellate court will not disturb a denial of a motion for a new trial unless there has been a manifest abuse of discretion, and that such motions grounded on newly discovered evidence are generally not favored. However, the judiciary system today well recognizes the problems confronting a person incarcerated in jail and one of the main arguments used for the present change in our bail-bond system is to not only allow a person charged with a crime to continue working and supporting himself, but also to afford to him the opportunity to gather evidence and witnesses on his behalf. Therefore, what may be considered lack of diligence on the part of a criminal defendant out on bond should not necessarily be the same measure of lack of diligence on a criminal defendant who unfortunately is incarcerated due to his inability to meet a bail bond because of being impoverished. Stated in another way I am saying that it is not difficult for this Appellant to have procured the necessary affidavits and evidence to support his motion for a new trial than it would have been if he was not incarcerated. The record shows that he was without counsel from the date of appeal entered in June, 1963 until October, 1963.

CONCLUSION

Your Appellant respectfully submits that he has, in fact, presented to the trial court in his motion for a new trial newly discovered evidence without lack of diligence on his part and that such evidence is material and vital and is likely to produce a judgment of acquittal on the retrial of this cause and that, therefore, considering the evidence and the motion before it, the

trial court abused its discretion in not granting a new trial to this Appellant.

RESPECTFULLY SUBMITTED,

/s/ A. Slater Clarke
A. SLATER CLARKE
Attorney appointed by this Court
to represent Augustus Bowser
210 Shoreham Building
Washington 5, D.C.

I hereby certify that I have personally served a copy of the Brief for the Appellant upon David C. Acheson, United States Attorney and Frank Q. Nebeker, Assistant United States Attorney, C/O U.S. Attorney's Office, U.S. District Court house , Washington, D.C.

/s/ A. Slater Clarke
A. SLATER CLARKE

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18787

AUGUSTUS BOWSER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
DAVID EPSTEIN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee the following question is presented on appeal.

Did the trial court abuse its discretion in denying a motion for a new trial on the grounds of newly discovered evidence where due diligence was not exercised in securing the testimony for trial, one of the witnesses at the hearing repudiated the portion of his affidavit in which he accepted guilt for the commission of the housebreaking, and neither witness presented testimony which, even if believed, would provide an alibi as to appellant's whereabouts at the time the crime was committed?

INDEX

TABLE OF CASES

Cases—Continued

*Cases chiefly relied upon are marked with an asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18787

AUGUSTUS BOWSER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on March 26, 1962, appellant and his co-defendants, John R. Sadler and Ronnie B. Ross, were indicated for violation of 22 District of Columbia Code, Section 1801 and 2201 (housebreaking and larceny). After a trial by jury appellant and co-defendant Ross were found guilty as indicted on May 2, 1962 (Criminal Case No. 243-62). By judgment and commitment filed on June 11, 1962, appellant was sentenced to a concurrent term of imprisonment of three years to ten years on the housebreaking and one year on the larceny. (See Record.) A direct appeal, which raised points re-

lating to the production of certain documents by the prosecution and making available of the Grand Jury minutes, was made to this Court and the conviction was affirmed. *Bowser* v. *United States*, 115 U.S. App. D.C. 302, 318 F.2d 273 (1963).

Nineteen months after his conviction appellant moved in the District Court for a judgment of acquittal or a new trial on the grounds of newly discovered evidence. Two affidavits, one signed by a co-defendant and the other by an inmate at Lorton Reformatory, sought to exonerate appellant from participation in the criminal offenses. On December 20, 1963, a lengthy hearing was held on the motion and the testimony of these two persons was presented to the trial court. The motions were denied. This appeal followed.

Evidence of appellant's guilt at trial.

Alphonzo W. Lancaster testified that on February 14, 1962, he was away from his apartment at 1430 Belmont Street, Northwest, between the hours of 10:30 a.m. and 4:00 p.m. Upon returning he discovered the door lock broken and numerous items missing including: a car coat, pair of bedroom slippers, record player, a camera, and approximately thirty dollars (Tr. 3-5).

Detective Alexander P. Fury of the Metropolitan Police Department testified. As a result of information he received he went to appellant's apartment at the Dunbar Hotel, announced himself, and asked if he could come in and talk (Tr. 45, 46). The officer was invited to enter the apartment (Tr. 47). While talking with appellant the officer noticed a number of the stolen items in the apartment (Tr. 47). Appellant was arrested, along with four other persons in the apartment. Subsequently, appellant stated, "I may as well get everything straight." He stated that five persons were involved in the housebreaking, including a juvenile, Ray Mitchell, who was also arrested in appellant's apartment. Appellant, however, exculpated the other three persons also arrested at

that time and stated that Mitchell knew the names of the real culprits. (Tr. 49, 50.)

The juvenile Mitchell testified and gave a precise description of the housebreaking, including the manner in which it took place and the names of the participants: appellant, Ross, Sadler, Rideout, and himself. Before lunch they returned with the goods to appellant's apartment where the items were left. (Tr. 125-137.) Later that evening Mitchell returned to appellant's apartment at which time the police arrived and arrested appellant, Mitchell, and the three other persons who were not connected with this housebreaking and were later released.

The Hearing on the motion for a New Trial

Appellant presented the testimony of two witnesses at the hearing on the motion for a new trial. John Sadler, who was implicated at trial in the commission of the housebreaking by the witness Mitchell, testified and immediately repudiated a crucial portion of his affidavit to the court, which he had filed on June 26, 1963. In the affidavit Sadler had accepted guilt for the commission of the housebreaking and exonerated appellant (See record). At the hearing Sadler stated that the affidavit was prepared by another inmate at the jail and, since he cannot read, was unread by him at the time of signing.[1] He then repudiated the portion of the affidavit in which he accepted guilt for the commission of the crime. (Hearing Tr. 12-18.) Sadler then testified that on February 14, 1962, the date of the commission of the crime, he was at appellant's apartment between 11:00 a.m. and noon.

[1] Sadler was indicted as a co-defendant in the same housebreaking (See Record). From April 28, 1962 until July 29, 1962, he was at St. Elizabeths Hospital for an examination. He was then placed in jail where he remained until October 11, when the charges were dismissed. In December 1962, Sadler was arrested for another housebreaking and convicted on May 28, 1963. As a result he was in jail as a fellow inmate of appellant during December 1962 and in May and June. Though he did talk with appellant during this period, Sadler's affidavit was not filed until June (Hearing Tr. 26-38).

Sadler stated that he entered the unlocked door of appellant's apartment, though he had only known him two weeks, and that at approximately 11:30 a.m. three persons came there bearing some clothing and other items which Sadler was unable to describe (Hearing Tr. 20-21). Sadler could not give the names of any of these persons except to relate the nickname of one (Hearing Tr. 19). He further stated that the juvenile Mitchell was not one of the persons who came to the apartment with the goods (Hearing Tr. 22).

During cross-examination Sadler denied having told Detective Fury that he was a look-out during the commission of the crime and that he reecived four dollars for participating in the offense (Hearing Tr. 38).

Detective Fury testified in rebuttal and stated that Sadler had named appellant Boswer, Ronnie Ross, and Ray Mitchell as participants in the housebreaking. Sadler also had admitted participating and sharing in the proceeds of the loot to the extent of four dollars (Hearing Tr. 66).

Bernard T. Rideout also testified. On October 17, 1963, he filed an affidavit merely stating that appellant Bowser was not involved in the housebreaking. Rideout accepted no guilt for the crime himself. His testimony was that on the morning of February 14, 1962, Rideout saw appellant between 9:30 and 10:30 a.m. at Seventh and Florida Avenue. He then walked with appellant to a dental clinic at Sixth and Florida Avenue, spending a total of five minutes with him. (Hearing Tr. 51, 56.)

Rideout was also implicated in the housebreaking and arrested two months after its commission.[2] At that point, Rideout stated he first learned of appellant's involvement. (Tr. 57.) He saw appellant in the jail subsequently (Tr. 58).

---

[2] Rideout was not indicted on the housebreaking. He was convicted of robbery (22 D.C.C. § 2901) pursuant to an indictment filed on September 4, 1962. This conviction was affirmed in *Rideout v. United States*, No. 18188, decided May 1, 1964, by judgment.

RULE INVOLVED

Rule 33, of the Federal Rules of Criminal Procedure, provides in part:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the grounds of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

SUMMARY OF ARGUMENT

The trial court, which presided both at the trial and during the hearing, did not abuse its discretion in denying the motion for a new trial on the grounds of newly discovered evidence. At the hearing the witness Sadler repudiated the portion of his affidavit in which he accepted guilt for the commission of the housebreaking. The testimony of neither witness, even if believed, provided an alibi as to appellant's whereabouts during the time the crime was committed. Further, the testimony of the witness Sadler was directly contradicted by a previous statement at the time of his arrest for the same crime.

ARGUMENT

The trial court properly exercised its discretion in denying appellant a new trial on the grounds of "newly discovered evidence".

(See Tr. 3-5, 45-47, 49-50, 125-137)
See Hearing Tr. 12-38, 51-52, 56-58, 66

The principles governing the granting of a new trial for newly discovered evidence are well established in this jurisdiction. The Court of Appeals set forth five prerequisites in *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 236, 188 F.2d 652, 653 (1951):

> "To obtain a new trial because of newly discovered evidence (1) the evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal."

These standards are accepted throughout the federal courts. See *e.g.*, *Johnson* v. *United States*, 32 F.2d 127 (8th Cir. 1929); *Evans* v. *United States*, 122 F.2d 461 (10th Cir. 1941), cert. denied, 314 U.S. 698 (1942); *Ledet* v. *United States*, 297 F.2d 737 (5th Cir. 1962); *Mills* v. *United States;* 281 F.2d 736 (4th Cir. 1960); *United States* v. *Fassoulis*, 203 F. Supp. 114 (S.D.N.Y. 1962).

The "newly discovered evidence" which appellant presented through affidavits and at the hearing on the motion falls short in nearly every respect from meeting the accepted standards. He suggests that Sadler, who was indicted as a co-defendant, was unavailable for testimony because of commitment to St. Elizabeths Hospital for mental observation (Br. 6, 7). No case or regulation is cited, and appellee is aware of none, which would prevent an inmate of the hospital from testifying in the

trial of another. Elementary diligence would require a person to ascertain the testimony of a co-defendant.[3]

Following conviction appellant was in the same jail with Sadler, yet this indifference to securing his testimony persisted. The affidavit which Sadler signed was not made until some nineteen months after the trial and two months after affirmance by this Court of the conviction in *Bowser* v. *United States*, 115 U.S. App. D.C. 302, 318 F.2d 273 (1963).

Similarly, the witness Rideout was not sought for his testimony. Appellant and Rideout knew each other and were, according to Rideout, walking together for a period of five minutes on the morning of the housebreaking (Hearing Tr. 51-52, 56). Since appellant was arrested on the same day, he cannot suggest that the pertinent date was not affixed in his mind. Merely contemplating his actions for the day would have led appellant to recall he was with Rideout for a short period that morning.

In this factual context appellant has not shown that he exercised any diligence in securing the witnesses, Sadler and Rideout, to testify at trial. Their existence was clearly known and thus the testimony cannot be considered newly discovered.

Prior to the hearing, John Sadler filed an affidavit in which he not only stated that appellant did not commit the housebreaking but that he, Sadler, accepted full guilt (See Record). At the hearing Sadler repudiated this confession and said that he did not know the affidavit contained such a statement (Hearing Tr. 18).

The affidavit, upon which appellant relies, lends no support to his motion for a number of reasons. Such an affidavit is not evidence which could be admitted in a new trial since out of court confessions are almost universally held to be inadmissible hearsay. *Donnelly* v. *United States*, 228 U.S. 243 (1913); See *United States* v.

---

[3] If indeed an inmate of St. Elizabeths Hospital cannot testify, appellant should have requested a continuance until the period of mental observation had terminated. No such request was made.

Lawrenson, 192 F.Supp. 719, 723 (D.Md. 1961), *aff'd* 298 F.2d 880 (4th Cir.), *cert. denied*, 370 U.S. 947 (1962); *Jeffries* v. *United States*, 215 F.2d 225 (9th Cir. 1954); *Neal* v. *United States*, 22 F.2d 52, 55 (4th Cir. 1927). Several courts have indicated that proffered material must be admissible at trial in order to justify a new trial on the ground of newly discovered evidence. See *Wolcher* v. *United States*, 233 F.2d 748, 749-50 (9th Cir. 1956) 352 U.S. 839 (1956); *United States* v. *Stromberg*, 179 F. Supp. 278 (S.D.N.Y. 1959); *Saunders* v. *United States*, 89 U.S. App. D.C. 291, 292, 192 F.2d 409, 410 (1951) (dictum). Also, the affidavit does not set forth any basis for the conclusory remarks that appellant had taken no part in the housebreaking.

Courts have always looked with suspicion at purportedly exculpatory statements evolved by follow prisoners and offered as newly discovered evidence. See, *e.g.*, *Evans* v. *United States*, *supra*, at 469; *LaBelle* v. *United States*, 86 F.2d 911, 912 (5th Cir. 1936); *Jones* v. *United States*, 279 F.2d 433 (4th Cir. 1960). During the hearing the credibility of the affidavit was drastically affected when Sadler repudiated the portion accepting guilt for the commission of the crime. Sadler stated that he is unable to read and write and, since the affidavit was written by a fellow inmate, he was unaware of the contents at the time of signing. Sadler's affidavit thus stands, in its principle respect, repudiated by the man who made it. This repudiation makes it impossible for appellant to rely on the affidavit, which surely cannot be considered credible if Sadler will not stand by it. See *Newman* v. *United States*, 238 F.2d 861 (5th Cir. 1956); *United States* v. *Lawrenson*, 210 F. Supp. 422 (D.Md. 1962), *aff'd*, 315 F.2d 612 (4th Cir. 1963). *Cf. Blodgett* v. *United States*, 161 F.2d 47, 56 (8th Cir. 1947); *United States* v. *Troche*, 213 F.2d 401 (2d Cir. 1954).

At the hearing Sadler testified that he was in appellant's apartment between 11:00 a.m. and noon on the day of the housebreaking. Three persons, none of whom was appellant, came to this apartment with some clothing

and other items which he could not describe at approximately 11:30 (Hearing Tr. 18-22). Even if believed, this testimony provides no alibi for appellant during the time the housebreaking occurred. At trial Ray Mitchell, one of the participants, testified that appellant, Sadler, and Rideout were all involved in the crime (Tr. 125-137). Sadler denied any participation in the housebreaking (Hearing Tr. 38). During rebuttal testimony Detective Fury stated that Sadler had admitted participating in the housebreaking, receiving four dollars for his efforts and implicating appellant, Rideout, and Mitchell (Hearing Tr. 66).

Similarly, the testimony of Rideout at the hearing provides little of value to appellant's cause. Rideout merely stated that appellant was with him for a five minute period during the hour between 9:30 and 10:30 a.m. (Hearing Tr. 51-52, 56). Since the housebreaking occurred between 10:30 a.m. and 4:00 p.m. this testimony is of no recognizable value.

The District Court, especially where as here the same judge presided at the trial, has very broad discretion in passing on a motion for a new trial on the grounds of newly discovered evidence. *McDonnel* v. *United States*, 81 U.S. App. D.C. 123, 155 F.2d 297 (1946); *United States* v. *Johnson*, 327 U.S. 106, 112 (1946). Where the motion for a new trial requires the trial court to weigh credibility of the testimony taken at a hearing on the motion, its evaluation is not subject to appellate reversal except in the most extraordinary circumstances. *United States* v. *Johnson*, *supra*, at 111; *United States* v. *Gannt*, 298 F.2d 21 (4th Cir. 1962). See also *Blackburn* v. *United States*, 97 U.S. App. D.C. 62, 228 F.2d 33 (1955). Moreover, in "assessing the probative value of proffered new evidence the district judge, if he presided at the trial of the case, may exercise his discretion in the light of the understanding he gained at the trial." *Wolcher* v. *United States*, *supra*, at 75. See also *United States* v. *Garrison*, 296 F.2d 461 (7th Cir. 1961), cert. denied, 369 U.S. 804 (1962).

The trial court, having considered and weighed the quality of the testimony which would be offered at a new trial and the likelihood of such testimony affecting the outcome, properly exercised its discretion in denying the motion for a new trial.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
DAVID EPSTEIN,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 747000 2M